

# I Object!

– James Eckert, Esq.

## Re-Opening Hearings

Ever have a witness testify to something at trial that would have been really useful if they had said that at the suppression hearing? Once the suppression motion is denied, certain parties tend to relax, and their trial testimony is less well tailored to the needs of a suppression hearing than it was at the suppression hearing. Well, what do you do when the trial testimony is great on suppression, but suppression has already been denied? I am glad you asked.

Trial testimony is not relevant to the determination of the propriety of a suppression hearing ruling **unless**, at trial, the defendant moves to reopen the relevant hearing based on testimony at trial (*People v Kollar*, 305 AD2d 295, 299 [1st Dept 2003] footnote 1)(we cannot use footnotes in appellate briefs, *quod licet Jovi non licet bovi*).

Criminal Procedure law 710.40(4) provides: If after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

Mere contradiction of one witness by another will probably not be enough, especially if the trial witness' testimony could have been discovered by the defense prior to the pre-trial hearing (*People v Tucker*, 41 AD3d 210 [1st Dept 2007]). So if a civilian witness testifies at trial to something that contradicts police, that might not be enough. However, it often happens that one witness will either contradict or seriously undercut his own hearing testimony while on the stand at trial. With their guard down, witnesses will sometimes provide additional details which would have seriously impacted the result of a suppression hearing. Just because you didn't trust the witness doesn't make you responsible when they change their testimony.

Also, since we are *de facto* prohibited from calling the ID witness at a *Wade* hearing, that witness might well testify to something which would have affected the result of the *Wade* hearing. If we were unable to speak to the witness, or the witness declined to speak with us, then the relevant testimony was sufficiently undiscoverable prior to trial, it seems to me.

Granted, re-opening a hearing is not always in the defendant's interest, since the prosecution normally gets one bite at the apple and under certain circumstances this might represent a second bite (*see e.g. People v Williams*, 7 NY3d 15 [2006]). Normally, however re-opening the hearing helps the defendant. It's the motion which makes trial testimony relevant to the suppression issue, you don't need a favorable ruling. In some cases, merely making the request can be the difference between winning and losing on appeal.